CANADIAN CIVIL PROCEDURE

By

Garry D. Watson

Allan C. Hutchinson

Robert J. Sharpe

William A. Bogart

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(For Professor Schiff's class only)

CHAPTER 7

RES JUDICATA

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Notes

1. Despite Naken there have been a number of class actions which have been permitted to proceed by lower courts. The cases have either been held to involve claims for relief which do not require participation by individual members of the class or Naken has been distinguished in some other way. For example, in Ranjoy Sales and Leasing Ltd. et al. v. Deloitte, Hoskins & Sells (1984), 31 Man. R. (2d) (C.A.) 87, plaintiffs brought a class action on behalf of creditors of bankrupt companies claiming the defendants negligently prepared audited financial statements the reliance upon which induced the plaintiffs to loan money to the bankrupt companies. In allowing the class action the Manitoba Court of Appeal commented (93):

The four plaintiffs claim damages for themselves and all other "investor" creditors of Winnipeg Mortgage Exchange Ltd. and its wholly owned subsidiary, Winnipeg Mortgage Holdings Ltd. (both now bankrupt), against the defendant auditors of the bankrupt companies. Their cause of action is based on their deemed reliance on audited financial statements of the companies prepared by the defendant for the years ended January 31, 1976 to 1979 inclusive, which they allege were negligently inaccurate and misleading. They claim as damages the shortfall between the amount of their investment in the companies and the amount recovered by the companies' trustee in bankruptcy.

[27] The investor creditors are known. There are 950 of them and they are all represented by counsel for the plaintiffs. There may be distinctions within the class. Some investor creditors may have invested their monies prior to the preparation of the financial statements for the year ended January 31, 1976. They could not claim deemed reliance on those statements or statements prepared in subsequent years. Some investor creditors may have actually seen and relied on the audited financial statements. They may have a superior cause of action based on actual reliance.

[28] The deficiencies alleged in the audited financial statements are not the same for each of the four years. It is possible that a distinction might exist within the class depending on the year in which an investor creditor invested his money.

[29] Now is not the time to speculate upon those distinctions, and, in my view, it would be premature to refuse a class action because those or other distinctions might arise during the proceedings. I prefer the approach taken by Dea, J., in **Alberta Pork Producers** (the trial decision). The better procedure would be to redefine the class to exclude any persons where there is evidence, either at trial or before, that indicates that such a person may be prejudiced if included in the class.

[30] Here, even more so than in **Alberta Pork Producers**, the fund or common interest, and the participation of each class member in it, are capable of simple determination and computation.

[31] A final comment on the argument that procedural prejudices result to the defendant in a class action. Estey, J., commented in **Naken** that the court rules do not make discovery, production and other pre-trial procedures available to non-parties or to parties against non-parties. The Ontario Law Reform Commission **Report on Class Actions** makes a similar statement, that "it would seem that the defendant in a class action cannot discover any of the members of the class. His rights of discovery, in other words, are limited to discovery of the representative plaintiff."

[32] Queen's Bench Rule 288 says:

> "288 A person for whose immediate benefit an action is prosecuted or defended may, without order, be examined for discovery."

It is not apparent whether the corresponding Ontario rule (Rule 333) was referred to Estey, J., or considered by him. The Ontario Law Reform Commission commented that Ontario Rule 333 has been interpreted narrowly, and applies only where it is proved the plaintiff is a nominal party only, who participates at the instigation of, or solely to benefit, another person from whom discovery is sought. I have been unable to find a decision commenting upon the application of the rule to a class action. It seems to me, however, that the plain meeting of the words are capable of a more liberal construction. The rule may have application to class actions in which the members of the class have separate and individual claims. It may not apply where the relief sought is equitable and general, as in a ratepayer's action challenging a municipal bylaw which affects the whole community.

[33] I am not satisfied that discovery and other pre-trial procedures going beyond the named plaintiffs would not be available to a defendant in a class action, with a little ingenuity on the part of counsel and the occasional intervention of the court.

2. Quebec is the only jurisdiction in Canada which has engaged in legislative reform of class actions: see L.R.Q., C.R. 21 modifée par L.Q. 1982, c. 37, art. 20 à 25. For commentary on the act and how it has been interpreted see: Lauzon, "Le Recours Collectif Quebecois: Description et Bilan" (1984), 9 C.B.L.J. 324.

3. The Ontario Law Reform Commission in its three volume Report on Class Actions (1982) made lengthy and detailed recommendations for the liberalization of class actions. For an extensive review of the report see: DuVal (1983), 3 Windsor Yearbook of Access to Justice 411.

4. It is possible for defendants to be sued as a class: see, for example, Dimisio et al. v. Allain et al. (1985), 50 C.P.C. (Ont. H.C.). However, far fewer cases have involved attempts to bring defendant class actions as opposed to plaintiff class actions and there has been much more pressure to reform plaintiff than defendant class actions. Why?

The next two excerpts differ starkly in their view of class actions. What is it about the nature of class actions that Glenn sees as inimical to the function of courts? What makes Bogart believe courts and their procedures are so malleable that they can manage class actions and that, in any event, courts ought to be entertaining issues which class actions will present?

Glenn, "Class Actions in Ontario and Quebec" (1984), 62 Can. Bar Review 247

> The civil adjudicative process, whether of the adversarial or of the investigative tradition,[101] is profoundly marked by liberal political philosophy. The individual is free to sue or not sue, to defend or not defend. If litigation is decided upon, its terms are a matter of party choice and courts will respect this choice. Both sides are free to make their case, and courts will follow them through a wide range of procedural devices chosen to allow full presentation of fact and law. It is a process sympathetic to detail, profoundly conscious of principles of natural fairness, and tolerant of uncompromising struggle. Because of all this, and because of the ensuing expense, it seeks both to bestow this attention where it is most needed, and to ensure that it is not wasted. Only true adversaries are thus blessed with standing, aggregation of claims is excluded for purposes of establishing jurisdiction, resolved disputes are declared moot, and a decision rendered becomes permanent law for those (though only those) having sought it. If each of these ingredients is inevitably elastic and subject to interpretation, the entire process remains faithful to its dominant ethic. The judiciary (particularly the elitist one of the common law tradition) is thus not a force of police, and the entire corpus of civil or private law is revealed, through the nature of its enforcement mechanism, as an optional device for acute conflict resolution. The so-called 'publicization' of private law, through broadening of rules of standing, reliance on general clauses of Bills of Rights, or efforts to engage in class litigation, may remain a marginal phenomenon absent fundamental changes in institutions. It is perhaps more appropriate to speak of the 'privatization' or dilution of the concept of public law.[102]

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To say that class actions involve the judiciary in a legislative function is not, however, in the view of many, to condemn them. Increased judicial power is today frequently defended as inevitable in the conditions of western, liberal society. This synchronic concept of "modernity" would see the judiciary expanding in influence in response to the growth of measures of mass social control. The class action becomes simply a useful device in the fulfillment of this contemporary judicial role.[143] A more universalist justification may be found in historic doctrines of judicial law-making, particularly those of common law countries. For if class action judgments are a form of law-making, in what manner can they be distinguished from binding precedent, long accepted as a necessary form of judicial commitment in the absence of legislative guidance? Yet neither of these broad possible justifications for class action development can be taken as estabished, and there is much to indicate they are mistaken.

Do modern conditions force a new role upon our judges? Much of the judicial system itself would suggest a negative response, since it remains in general outline as hostile as ever before to the pursuit of even individual claims. An elitist judiciary, small in number, functioning in an expensive and time-consuming court system with limited rights of appellate review, is not an obvious challenger to established bureaucracies. To the extent there has been no significant increase in judicial resources it may be presumed that society has not renounced the ideal of limited, and therefore more impartial, judicial activity. Access to justice, in the measure that it uses up this valuable commodity of impartial decisions, is therefore actively discouraged by existing judicial structures. Yet, it is said, this lag of current institutions must be corrected and is in itself no guide to a correct model. Inertia must not be confused with wisdom. Not only must courts be adequately staffed to meet increasing caseloads, they must widen the scope of judicial enquiry and be more receptive to re-allocation of power within the state. One of the recurring justifications for class actions is that of assisting less powerful elements of society. Improved access to justice, concludes the Ontario Law Reform Commission, a good thing in itself, will result in desirable behaviour modifications,[144] and the class action is therefore justifiable as a means to those ends.

The unanswered question in the debate thus far is why increased access to justice and any possible behaviour modification justifies such a significant distortion of the judicial function. Even if one accepts the need for increased access to justice and behaviour modification, as well as the potential of class actions to effect them,[145] why do these arguable benefits outweigh the hazards of inviting the judiciary into the legislative arena? There is no discussion in the report of the Ontario Law Reform Commission of this question, in spite of its view that class actions will result in behaviour modification. Are there no institutional hazards for the judiciary in openly legislating changes in the structure of power in society? Will a judiciary which has engaged in class legislation for a half-century have impaired its adjudicative authority? • • •

Bogart, "Naken, The Supreme Court and What Are Our Courts For?" (1984), 9 C.B.L.J. 280, 304-308

If one accepts the basic proposition that we need a mechanism to challenge the actions of large entities, then it follows that we must be prepared to accept procedural changes that will allow such challenges to be made effectively. Unless one is prepared to create a totally new adjudicative body or adopt some other far-ranging solution, it seems to follow that the court's role will be altered as it begins to deal with this new form of litigation.

In contrast, to reject the need for effective challenge to the activities of large entities would, it seems to me, only breed confusion and frustration in a citizenry which already feels hopelessly at odds with much of the workings of society during the last part of the 20th century.[102] Even if such frustration is not the stuff of revolutions, at a minimum the widely held perception of our courts as anachronistic and unresponsive may spread.[103] More damaging may be the belief that the rules of litigation really do favour institutions and are less concerned with the enforcement of rights by individuals.[104]

To me the only realistic alternative is to develop new rules and standards which will allow this new form of litigation to proceed. In this Estey J.'s judgment in *Naken* is disappointing because it displays so little interest in the problems and issues raised by cases like *Naken*. Such an attitude does little to deflect the trenchant criticisms about the Supreme Court's lack of capacity or willingness to engage in far-ranging analysis of difficult problems.[105] Nevertheless, one clear effect of the Supreme Court's decision in *Naken* is to signal the Legislatures that change, if it is to come, must come through them.

In attempting to define the role of the court in class action litigation the recommendations of the Ontario Law Reform Commission in its *Report on Class Actions* offer a significant basis for discussion. The commission has attempted to steer a middle course between, on the one hand, a passive court that does little to control litigation and, on the other hand, an active court which, in perception at least, dominates it.

The key to its recommendations is to give the court a more developed role but one which is defined by specific guidelines. For example, a critical stage of the class action is the certification hearing during which the court decides whether or not the action should proceed as a class action. In Chapter 10 of the report, the commission makes recommendations about the certification hearing, the timing of it, the means by which evidence is placed before the court in the hearing and the powers of the court when it hears the certification application.[106] In addition, the court would be empowered to allow or refuse certification and to make all amendments to the proceedings required by its order.[107] The court could also amend a certification order and, subsequently, set the order aside if satisfied that the action was no longer one which should be a class action.[108]

In order to control the class action during and from certification to trial of the common questions general management powers are recommended for the court. These powers most closely resemble some of the pre-trial powers exercised by "activist" judges in the United States. While there are many differences, the vital one is that in the commission's model one judge would take all pre-trial motions and interlocutory proceedings, including the certification hearing, but another judge would preside at the trial of the common questions. The trial judge would also supervise any proceedings after the hearing of the common questions, for example, if the class were successful but hearings were necessary to determine individual questions.[109] Thus the function of "managing" the litigation during the pre-trial phase and actually adjudicating the merits of the action at trial would be separated. The lack of separation of these functions is a main criticism of those concerned with the activist stance of courts in the United States.[110] Central to this potential for greater involvement by the court is a provision which states:[111]

> 15. The court, upon the application of a party or upon its own motion, may make any order under this Act and all appropriate orders determining the course of the action for the purpose of ensuring the fair and expeditious determination thereof, including an order to prevent undue repetition or complication in the action, and the court may impose such terms and conditions upon the parties as it considers proper.

In making the recommendation concerning broader management powers the commission recognized the dual rationale of the need to protect the interest of absentees[112] and to deal with the complexity inherent in many class actions.[113] However, the commission was careful to point out that its guiding philosophy was not to depart from the adversarial model of litigation. It simply wished to equip the court with sufficient powers to allow it to deal properly with this new form of expanded and complex litigation while, at the same time, permitting as much independence and freedom to the parties as possible.[114]

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For those who see the potential of class actions there is clearly an agenda of issues to be discussed concerning their structure so that their intended purposes are achieved and abuses avoided. Issues such as design of a certification mechanism, whether class actions should play a deterrence function, calculation and distribution of monetary claims, the role of class members, and costs, are only a selection of issues which merit reflection. For me the effect of class actions upon the court and how we should design the mechanism both to allow the court to adjust to this new form of litigation and to be sufficiently innovative in managing it is the most fascinating aspect. To what extent will we need to become part of the debate about the appropriate function of courts in the new litigation which now seems so much a part of the American legal culture and how will we solve the issue to which this debate gives rise?[115]

> Notwithstanding the complexities and controversies surrounding them, I believe those who reject class actions will have a hard road. If the basis of rejection is the lack of need for such a procedure, I think they will have a difficult time demonstrating that there are not widespread harms that require a means of redress. If they acknowledge these harms but simply object to class actions as the means of redress they will then have to suggest a suitable and adequate alternative. Thinking about such alternatives will be a fascinating exercise and we should not hesitate to do so. However, in the end I believe it is the class action — the *ad hoc* collectivity which organizes its members for a specific purpose and limited time — which will best answer the needs of group action at the end of the 20th century

The following are some sections of the proposed Act recommended by the Ontario Law Reform Commission in its 1982 Report on Class Actions, referred to earlier, which has not as yet been enacted. Try to identify the policy behind these sections. Are they more responsive to Bogart's view, above, of this form of litigation or of Glenn's, above. Would they answer the issues raised by the Supreme Court in Naken, above, as part of its reasons for not allowing the class action in that case?

Interpretation

1. In this Act,

(*c*) "certify" means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided by clause 3(3)(*a*);

(*b*) "class action" means an action certified as a class action by an order made under this Act;

(*c*) "court" means the Supreme Court or a county or district court;

(*d*) "discovery" means examination for discovery or production and inspection of documents under the rules of court, and "to discover" has a corresponding meaning.

COMMENCEMENT OF ACTION

Commencement of action

2.—(1) One or more members of a class of persons may commence an action on behalf of the members of the class.

(2) A person who commences an action under subsection (1) shall be known as the representative plaintiff. Representative plaintiff

(3) The representative plaintiff shall give notice in writing to the Attorney General of the commencement of the action. Notice to Attorney General

CERTIFICATION

3.–(1) After the commencement of an action under section 2, the representative plaintiff may apply to the court for an order certifying the action as a class action. Application for certification order

(2) An application under subsection (1) shall be commenced within 90 days from the day upon which the defendant filed his appearance or from the defendant's default in so doing. Time for application

(3) Subject to section 6, the court shall certify the action as a class action if the court finds that, Prerequisites to certification order

(*a*) the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class;

(*b*) the class is numerous;

(*c*) there are questions of fact or law common to the class;

(*d*) a class action would be superior to other available methods for the fair and efficient resolution of the controversy; and

(*e*) the representative plaintiff would fairly and adequately protect the interests of the class.

Superiority of class action

4. In determining whether a class action would be superior to other available methods for the fair and efficient resolution of the controversy, the court shall consider all relevant matters including,

(*a*) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(*b*) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions;

(*c*) whether the class action would involve claims that are or have been the subject of any other proceedings;

(*d*) whether other means of resolving the claims are less practicable or less efficient; and

(*e*) whether the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other practicable means.

Adequacy of representation

5. In determining whether the representative plaintiff would fairly and adequately protect the interests of the class, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class.

Costs and benefits of class action

6.—(1) Where the court finds that the conditions set out in subsection 3(3) have been satisfied, it may nevertheless refuse to certify the action as a class action if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, the courts or the public that might be secured if the action were certified.

Onus

(2) The onus of establishing that an action should not be certified as a class action by reason of subsection (1) is upon the person so contending.

Order not to be refused

7. The court shall not refuse to certify an action as a class action on the ground only that the relief claimed,

(*a*) includes a claim for damages that would require individual assessment in subsequent proceedings involving the defendant; or

(*b*) arises out of or relates to separate contracts between members of the class and the defendant.

* * *

Attorney General as representative plaintiff

14. At any time in an action under this Act, if it is in the public interest that the Attorney General act as representative plaintiff and either the representative plaintiff does not or will not fairly and adequately protect the interests of the class or the representative plaintiff consents,

(*a*) the court may invite the Attorney General to be the representative plaintiff; or

(*b*) the Attorney General may apply to the court for permission to be the representative plaintiff.

* * *

NOTICE

Notice of class action

16.—(1) After certifying an action as a class action, the court may order that notice be given to members of the class informing them of the class action.

Criteria

(2) In deciding whether to order notice under this section, the court shall consider all relevant matters including,

(*a*) the cost of giving notice;

(*b*) the nature of the relief sought;

(*c*) whether the court has determined that some or all of the members of the class may exclude themselves from the class action;

(*d*) the size of the claims of the members of the class; and

(*e*) the total amount of monetary relief claimed in the action.

Method of notice

(3) Where the court orders notice under this section, notice shall be given by advertisement, publication, posting or distribution, unless the court, having regard to the matters set out in subsection (2), orders notice by some other method, including individual notice to a sample portion of the class, and the court may order notice to be given in different ways to various members of the class.

Contents of notice

(4) Notice under this section shall include,

(*a*) a brief description of the class action including the relief claimed;

(*b*) a brief description of the class;

(*c*) a statement that a member of the class will be bound by any judgment on the questions common to the class;

(*d*) if the court has determined that individual members may exclude themselves from the class action, a statement to that effect, indicating how and by what date the members may exclude themselves and the consequences to the members if they exclude themselves or fail to do so;

(*e*) a statement that a member of the class may apply to intervene in the class action;

(*f*) the name and address of the representative plaintiff to which further inquiries may be directed; and

(*g*) any other information that the court considers proper.

* * *

EXCLUSION

Exclusion

20.–(1) The court shall determine whether some or all of the members of the class should be permitted to exclude themselves from a class action.

Criteria

(2) In determining whether members of the class should be permitted to exclude themselves from the class action, the court shall consider all relevant matters including,

(*a*) whether as a practical matter members of the class who exclude themselves would be affected by the judgment;

(*b*) whether the claims of the members of the class are so substantial as to justify independent litigation;

(*c*) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves;

(*d*) the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves; and

(*e*) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.

Notice of exclusion

(3) Where the court has determined that some or all of the members of the class may exclude themselves, they may do so by informing the court in writing by a date specified by the court of their desire to be so excluded.

Exclusion and judgment

(4) The names of persons who have excluded themselves from the class action shall be set out in any judgment on the questions common to the class or in any settlement of the action under this Act.

Effect of exclusion

(5) A person who has excluded himself from the class action is no longer a member of the class for any purpose and is not entitled to any relief awarded in the class action.

DISCOVERY

Rights of discovery and examination before determination of common questions

21. Before the questions common to the class are decided,

(*a*) the representative plaintiff and the defendant have the same rights of discovery against each other that are available in ordinary actions;

(*b*) after discovery of the representative plaintiff, the defendant may apply to the court to discover other members of the class;

(*c*) in deciding whether to grant leave to discover other members of the class, the court shall consider all relevant matters including,

(i) the stage of the class proceedings and the issues to be determined at that stage,

(ii) whether discovery is necessary for the purpose of the defence on the issues,

(iii) the approximate monetary value of the individual claims, where monetary relief is claimed, and

(iv) whether discovery will result in oppression, undue annoyance, burden or expense for the members of the class;

(*d*) a member of the class is subject to the same sanctions under the rules of court as any party in an action for failure to submit to discovery, except that the court shall not exclude a member of the class from recovery unless it determines that no other sanction is adequate to protect the interest of the defendant; and

(*e*) the defendant shall not by subpoena require a member of the class other than the representative plaintiff to attend to be examined for the purpose of using his evidence upon any motion or application except by leave of the court, and in deciding whether to grant such leave, clauses (*b*), (*c*) and (*d*) apply *mutatis mutandis*.

MONETARY RELIEF

Aggregate assessment

22. In a class action where,

(*a*) monetary relief is claimed on behalf of the members of the class;

(*b*) no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the liability of the defendant to some or all members of the class; and

(*c*) the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by the individual members of the class with the same degree of accuracy as in an ordinary action,

the court shall determine the aggregate amount of the defendant's liability and give judgment accordingly.

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Establishing claims

25. (2) For the purpose of establishing the claims of members of the class, the court shall authorize such procedures as will minimize the burden imposed upon the class members, including the use of standardized proof of claim forms designed to elicit the information necessary to establish and verify such claims, the reception of affidavit, documentary, or other written evidence, and the auditing of claims upon a sampling or other basis.

Average distribution

26.–(1) Where the court gives judgment under section 22 but the circumstances render impracticable the determination of the members of the class who are entitled to share in the judgment or the exact share of the judgment that should be allocated to particular class members, the court may order that the members of the class are entitled to share in such judgment on an average or proportional basis if it is satisfied that failure to so order would deny recovery to a substantial number of class members.

Cy-près distribution

27.–(1) The court may order that any money that has not been distributed under section 23, 24, 25 or 26 be applied in a manner that may reasonably be expected to benefit some or all of the members of the class, and for this purpose the court may order that any such money be returned to the defendant upon such terms and conditions respecting its use as the court considers proper.

Idem

(2) The fact that an order made under this section may benefit persons who are not members of the class or who have already received monetary relief under section 23, 24, 25 or 26 is not a bar to the making of such an order if the court is satisfied that a reasonable number of members of the class who would not otherwise receive monetary relief will benefit thereby.

Forfeiture to Crown or return to defendant

28. The court may order that any money that has not been distributed under section 23, 24, 25, 26 or 27 be forfeited to the Crown or returned unconditionally to the defendant as the court considers proper.

Individual proceedings

31.—(1) Where the court determines the common questions in favour of the class, and subsequent proceedings that require participation by members of the class and the defendant are necessary to determine individual questions, the court may,

(*a*) conduct such proceedings alone or with other judges of the court;

(*b*) appoint one or more persons to conduct such proceedings by way of inquiry and report; or

(*c*) on consent of the defendant, and of the representative plaintiff on behalf of the class, order such proceedings and give directions for the conduct thereof.

Directions

(2) The court may give such directions as may be necessary for the conduct of proceedings under clause (1)(*a*) or (*b*), including any directions to achieve conformity of proceedings, and in giving such directions the court shall order the simplest, least expensive and most expeditious method of determining the issues that is consistent with justice to the members of the class, the defendant and the representative plaintiff, including dispensing with any procedure that it considers unnecessary and directing special procedures regarding such matters as discovery, admission of evidence and means of proof.

Confirmation of report

(3) The person who has conducted proceedings under clause (1)(*b*) shall record his findings in a report which is not effective until confirmed by the court.

Judgment on individual questions

(4) The determination of any individual questions under this section constitutes a judgment.

Binding effect of judgment on common questions

34.—(1) Judgment on the questions common to the class is not binding upon persons who have excluded themselves from the class action or upon the defendant in any subsequent proceeding brought by a person who has excluded himself.

Idem

(2) Judgment on the questions common to the class binds every member of the class who has not excluded himself from the class action to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order.

Contents of judgment on common questions

(3) A judgment on the questions common to the class shall,

(*a*) name or describe the members of the class who are bound by the judgment;

(*b*) describe the nature of the claim made on behalf of the members of the class and specify the relief awarded; and

(*c*) define the questions of fact or law common to the class.

SETTLEMENT, ETC.

Settlement, etc of action

36.–(1) An action commenced under this Act shall not be settled, discontinued or dismissed for want of prosecution without the approval of the court and upon such terms and conditions, including notice or otherwise, as the court considers proper.

Cost of notice

(2) Unless the court orders otherwise, the cost of any notice ordered under this section may be determined by agreement of the parties.

COSTS AND FEES

Costs
R.S.O. 1980, c. 223

41.–(1) Notwithstanding section 80 of the *Judicature Act*, but subject to section 46, costs shall not be awarded to any party to an action under this Act at any stage of the proceedings, including any appeal, except,

(*a*) on an application for an order certifying the action as a class action, where the court is of the opinion that it would be unjust to deprive the successful party of costs;

(*b*) in the event of vexatious, frivolous or abusive conduct on the part of any party; or

(*c*) on an interlocutory motion.

Security for costs

(2) Subject to section 46, security for costs shall not be required in an action commenced under this Act.

Class members not liable for costs

(3) Subject to section 46, the members of the class, other than the representative plaintiff, are not liable for costs.

Agreements regarding payment for fees and disbursements
R.S.O. 1980, c. 498
R.S.O. 1897, c. 327

42.–(1) Notwithstanding section 30 of the *Solicitors Act* and *An Act respecting Champerty*, a solicitor may make an agreement in writing with the representative plaintiff regarding payment for fees and disbursements in respect of an action commenced under this Act stipulating for payment only in the event of success in the action.

No jury

50. An action under this Act shall not be tried by a judge with a jury.

Presiding judge

51.–(1) In an action under this Act, the same judge shall preside at all motions and interlocutory proceedings before the trial of the questions common to the class and, subject to section 31 and unless the parties and the judge otherwise agree, another judge shall preside at the trial of the questions common to the class and thereafter.

Where judge unable to continue

(2) If, at any time in an action under this Act, the presiding judge is unable for any reason to continue, another judge shall be designated in accordance with the practice of the court.